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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Petitioners,

v.

MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

M. ELIZABETH MEDAGLIA
JAMES T. SCHALLER
ROBERT N. KELLY
NICHOLAS P. JELLINS
JACKSON & CAMPBELL
1120 20th Street, N.W.
Suite 300 South
Washington, DC 20036
(202) 457-1600

Attorneys for Petitioner American Home Assurance Company

WILLIAM T. COLEMAN, JR.
Counsel of Record
JOHN L. ALTIERI, JR.
DONALD T. BLISS
PAUL R. KOEPFF
CARL R. SCHENKER, JR.
O'MELVENY & MYERS
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004
(202) 383-5325

Attorneys for Petitioner Insurance Company of North America

May 11, 1994

[Counsel for additional petitioners listed on inside front cover.]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

43 pp

JAMES KIRK PERRIN
DANIEL P. CASWELL
TERESA ROONEY WILLIAMS
HASKELL & PERRIN
200 West Adams Street
Suite 2600
Chicago, IL 60606
(312) 781-9393

Attorneys for Petitioner Continental Casualty Company

JOHN G. ROBERTS, JR.
HOGAN & HARTSON, L.L.P.
Columbia Square Building
555 13th Street, N.W.
13th Floor West Tower
Washington, DC 20004
(202) 637-5810

Attorney for Petitioner First State Insurance Company

ELLIOTT ABRUTYN
MORGAN, MELHUISH, MONAGHAN, ARVIDSON, ABRUTYN & LISOWSKI
651 W. Mount Pleasant Avenue
Livingston, NJ 07039
(201) 994-2500

Attorney for Petitioner General Accident Insurance Company of America

JOHN C. SULLIVAN
MANTA AND WELGE
101 Carnegie Center
Suite 215
P.O. Box 5306
Princeton, NJ 08543
(609) 452-8833

Attorney for Petitioner Liberty Mutual Insurance Company

QUESTIONS PRESENTED

In the decision below, the Supreme Court of New Jersey held that a "pollution exclusion" clause, widely utilized in insurance contracts and expressly approved by the New Jersey Department of Insurance in 1971, has the "plain meaning" asserted by petitioners. The state supreme court, however, proceeded *sua sponte* to invoke principles of equitable estoppel and, without notice, hearing, or a relevant evidentiary record, estopped the "insurance industry" from enforcing the plain meaning of the regulator-approved exclusion in New Jersey due to supposed (but non-existent) misrepresentations made to state regulators in 1970. This estoppel has a potential financial impact of billions of dollars on an industry-wide basis.

In view of the foregoing, the questions presented are:

(1) Is the Due Process Clause of the Fourteenth Amendment violated when a state supreme court *sua sponte* invokes the doctrine of equitable estoppel to impose retroactive liabilities without allowing an evidentiary hearing on any of the disputed factual issues dispositive under the state's own estoppel principles?

(2) Is the decision below in conflict with the express holdings of this Court under the Due Process Clause in *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937) (Cardozo, J.), and *Saunders v. Shaw*, 244 U.S. 317 (1917) (Holmes, J.)?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The parties to the proceedings in the Supreme Court of New Jersey were Morton International, Inc. (as plaintiff-appellant); General Accident Insurance Company of America, Affiliated FM Insurance Company, Continental Casualty Company, and First State Insurance Company (as defendants-respondents); and Liberty Mutual Insurance Company, American Home Assurance Company, Insurance Company of North America, Underwriters at Lloyd's London, and Certain Subscribing London Market Insurance Companies (as defendants-respondents and cross-appellants). (*See* Appendix 1a.)

Petitioners before this Court are Insurance Company of North America, American Home Assurance Company, Continental Casualty Company, First State Insurance Company, General Accident Insurance Company of America, and Liberty Mutual Insurance Company. The Rule 29.1 list of their parent companies and subsidiaries (other than wholly-owned subsidiaries) was filed with the Court on March 29, 1994 and is reproduced at Appendix 264a.

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PETITION FOR A WRIT OF CERTIORARI

The Insurance Company of North America, American Home Assurance Company, Continental Casualty Company, First State Insurance Company, General Accident Insurance Company of America, and Liberty Mutual Insurance Company (collectively "petitioners") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The opinions of the supreme court (App. 1a) and appellate division (App. 114a) are reported at 134 N.J. 1, 629 A.2d 831 and 266 N.J. Super. 300, 629 A.2d 895, respectively. The unreported opinion of the trial court appears at App. 168a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1988). The decision below was rendered July 21, 1993; timely petitions for reconsideration were denied on January 11, 1994. (App. 198a-201a.) On March 30, 1994, Justice Souter extended petitioners' time to file this petition until May 13, 1994. (App. 204a-05a.)

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, U.S. Constitution, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The decision below raises important questions under the Due Process Clause and this Court's holdings in *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937) (Cardozo, J.), and *Saunders v. Shaw*, 244 U.S. 317 (1917) (Holmes, J.). Contrary to those holdings, the New Jersey supreme court invoked *sua sponte* a legal theory (equitable estoppel) not alleged or pursued at any stage of the case,

expressly refused petitioners' request for a remand to allow development of an evidentiary record on disputed factual issues, and instead made *de novo* factual determinations by reference to tangentially related case reports, journal articles, and other non-evidential material. The result of this fundamentally flawed procedure was a holding that insurers are equitably estopped from enforcing what the supreme court conceded to be the "plain meaning" of a policy provision approved years earlier by New Jersey's insurance department and other insurance regulators throughout the country. (App. 86a; *see* App. 83a-95a.)

The provision in question, widely known as the "*pollution-exclusion clause*," appears in the great majority of comprehensive general liability ("CGL") policies issued to businesses and local governments throughout the United States from 1970 to approximately 1985. The clause provides:

> This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

(App. 33a.)

This clause has been and will continue to be the focus of numerous lawsuits in state and federal courts. (*See* App. 52a-83a.) After approval of the clause, there was an explosive growth in stringent environmental legislation and regulation, at both local and national levels.[1] In particular,

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[1] *See* Frank B. Friedman, *Practical Guide to Environmental Management* 11-20 (1993) (noting the expansion of federal environmental statutes and regulation during the 1970s); Frank F. Skillern, *Environmental Protection: The Legal Framework* 2 (1981) (describing the 1970s as the "environment decade").

statutes such as the 1980 Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (1988 & Supp. IV 1992), and its state counterparts typically impose "liability . . . retroactively and without regard to fault" on those involved "directly or indirectly" in hazardous waste disposal. (App. 94a.) The court below noted that "[e]stimated remediation costs [under such statutes] range from 150 to 750 billion dollars" nationwide. (App. 94a.)[2] As a result, numerous polluting entities have sought coverage for environmental liabilities notwithstanding the presence of the pollution-exclusion clause in their policies. There are hundreds of state and federal cases pending throughout the country in which the meaning and enforceability of the clause are in question.

A. CGL Policies.

CGL policies originally provided liability coverage only for bodily injury and property damage "caused by accident."[3] In 1966, the "accident"-based type of CGL policy was replaced by a new type covering liability for damage "resulting from an occurrence," and the term "occurrence" was defined to include "exposure to conditions." (App. 36a-39a.) Under the post-1966 "occurrence"-based policy, CGL coverage could be available when liability for property damage was caused by *gradual* processes, but only if the damage was "neither expected nor intended from the standpoint of the insured."[4]

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[2] Of the sites on the National Priority List for clean-up under CERCLA, 108 are located in New Jersey; this represents almost 10 percent of the total and is more than in any other state. *See* National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 8724, 8736-38 (1994) (to be codified at 40 C.F.R. Part 300); John H. Snyder & W. Dolson Smith, *Environmental/Asbestos Liability Exposures: A P/C Industry Black Hole*, BestWeek Property/Casualty Supplement 3 (Mar. 28, 1994).

[3] This discussion focuses on typical CGL policies; many domestic and foreign insurers also issued policies having widely varying provisions.

[4] The 1966 version of the typical policy defined "occurrence" as "an

In 1970, insurers belonging to the then Insurance Rating Board ("IRB") and Mutual Insurance Rating Bureau ("MIRB"), membership service organizations representing a substantial portion of the industry, developed the pollution-exclusion clause expressly to exclude CGL coverage for certain *pollution risks*. (App. 39a-41a.) As held by the Supreme Court of New Jersey below, the "plain meaning" of the IRB/MIRB pollution-exclusion clause differs from the definition of "occurrence" in two respects. (App. 86a; *see* App. 34a-35a.) First, the exclusion focuses on the circumstances of the polluting *discharge*, not (as under the definition of "occurrence") the *damage* caused by the pollution. Second, the exclusion bars coverage for pollution damage unless the discharge in question is "*sudden and accidental*," whether or not the resulting damage is "*expected or intended*" (the inquiry under the definition of "occurrence"). Therefore, under the pollution-exclusion clause, there is no coverage for pollution-damage liability in the absence of an abrupt and accidental discharge. (App. 34a-35a.)

IRB/MIRB representatives filed the proposed pollution-exclusion clause with state regulatory authorities throughout the country in 1970. The provision was approved for use in 47 states (including New Jersey), the District of Columbia, and Puerto Rico. The clause was later adopted by many non-IRB/MIRB companies as well.

B. The Suit Below.

In 1983, a predecessor of respondent Morton International, Inc. ("Morton") was held liable for the severe mercury pollution of Berry's Creek in the Meadowlands. Morton then commenced this action against a number of insurers, seeking declarations that the insurers were obliged to cover that liability under various primary and

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accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" In 1973, "occurrence" was redefined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" (App. 38a (emphasis added).)

excess CGL policies covering the period 1961 to 1976. (App. 5a-8a.)

Many of the policies sued upon included the IRB/MIRB pollution-exclusion clause.[5] Critically, however, Morton never argued in the trial court, the appellate division, or even the supreme court that the insurers should be equitably estopped from enforcing the "plain meaning" of the clause, nor did Morton seek to prove the elements required for an equitable estoppel. Rather, relying on several decisions of inferior New Jersey courts, Morton contended throughout the case that the pollution-exclusion clause is ambiguous and that the clause therefore should be construed to have the same meaning as the policy definition of "occurrence." *See, e.g., Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987.)[6]

Since Morton neither alleged nor sought to prove an equitable estoppel, petitioners had no reason or opportunity to develop an evidentiary record concerning the factual prerequisites that are essential to an estoppel under New Jersey law. There was no discovery on such matters and, since the issue was never raised, neither the trial court nor the appellate division made any findings or conclusions on the elements of an equitable estoppel. (*See* App. 168a; App. 114a.)

On August 27, 1987, the trial court granted summary judgment in favor of the insurers. It held that, without

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[5] Several petitioners here did not utilize the pollution-exclusion clause in the policies sued on below. (App. 8a-14a.) However, those petitioners subsequently adopted the clause and marketed countless policies utilizing it in New Jersey and throughout the country. (App. 43a.)

[6] According to Morton and the cases on which it relied, the word "sudden" in the concluding exception to the pollution-exclusion clause ("this exclusion does not apply if such discharge . . . is sudden and accidental") could mean "unexpected," rather than "abrupt." Hence, Morton asserted, "the crucial question" under the pollution-exclusion clause is the same as that under the definition of "occurrence"—"whether the insured intended or expected the harm for which it seeks coverage." (App. 206a.)

regard to the meaning of the pollution-exclusion clause, Morton's predecessors had "expected and intended" environmental damage and therefore there had been no covered "occurrence." (App. 185a, 189a-90a.) On October 2, 1991, the New Jersey appellate division affirmed, agreeing that there had been no covered "occurrence." (App. 148a-49a.) However, the appellate division also refused to repudiate its earlier position in *Broadwell* that the pollution-exclusion clause is ambiguous and therefore should be given the same meaning as the definition of "occurrence." (App. 153a n.1.)

C. The New Jersey Supreme Court's Decision.

The New Jersey supreme court granted cross-petitions for discretionary review, with Morton challenging the affirmance of summary judgment and petitioners challenging the appellate division's adherence to *Broadwell*. For the first time, Morton was supported by *amicus* briefs, filed by a group of manufacturing interests, by the New Jersey State League of Municipalities, and by the Attorney General of New Jersey.[7]

Neither Morton nor its supporting *amici* argued that IRB/MIRB defendants, much less the "insurance industry," should be equitably estopped from enforcing the pollution-exclusion clause as written if the clause were held to have the "plain meaning" attributed to it by petitioners. Rather, Morton and its *amici* sought to defend the appellate division holding in *Broadwell* that the clause is ambiguous. In that regard, they relied on dictionaries, other insurance usages of the phrase "sudden and accidental," and arguments concerning the 1970 regulatory history

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[7] As noted by the supreme court, "the interests of states in [environmental] insurance-coverage litigation are generally consistent with interests of insureds." (App. 50a.) This is because states are sometime policyholders and are the alternative last recourse for remediation costs. On behalf of the insurers, *amicus* submissions were made by the Insurance Environmental Litigation Association and Aetna Casualty & Surety Co.

drawn from case reports, journal articles, and 1970 regulatory materials not in the trial-court record.

Petitioners responded that the language of the pollution-exclusion clause is unambiguous, and hence that reference to the regulatory history in particular was unnecessary and improper. But they also emphasized repeatedly that the regulatory history involved "hotly contested factual issues" and that, "if the [New Jersey supreme court] believes there should be a resort to regulatory history . . ., [fundamental] fairness dictates that the matter be remanded for an evidentiary hearing [on] a full record." (App. 216a.)[8]

On July 21, 1993, the supreme court issued its lengthy opinion. The court rejected the ambiguity arguments of Morton and its supporting *amici*, holding (as the insurers maintained) that the "plain meaning" of the pollution-exclusion clause bars coverage for pollution damage in the absence of an abrupt and accidental discharge. (App. 34a-35a, 86a.) Accordingly, the court expressly overruled *Broadwell*, the appellate division precedent that Morton and its *amici* had sought to defend. (App. 34a.)

Had the supreme court stopped there, petitioners would have prevailed on the issues they raised. But the court went on to hold, *sua sponte*, that the "insurance industry"

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[8] Noting that *amicus* submissions to the supreme court were no substitute for an evidentiary record, petitioners stressed that "it is fundamentally unfair to let one side put its gloss on a few documents which it has chosen—without allowing the other side an adequate opportunity to challenge that interpretation with its own evidence and, where appropriate, by taking testimony of the authors and recipients. The insurers have not been given that opportunity. This Court is not a trial court, and it should not be lulled into becoming a finder of hotly contested factual issues that were never considered by the trial court." (App. 214a; App. 214a (noting "the dangers of admitting evidence in [an appellate court] where it cannot be challenged").) Elsewhere, petitioners stated that, if the court is "inclined to accept the representations from other cases about what [certain regulatory history] documents showed, we specifically challenge the accuracy and completeness of the 'evidence' and would request a plenary hearing." (App. 208a.)

is equitably estopped from enforcing the "plain meaning" of the IRB/MIRB pollution-exclusion clause in New Jersey except in instances in which "the insured *intentionally* discharge[d] a *known* pollutant." (App. 86a, 93a (emphasis added).) This estoppel was expressly intended to "materially expand" CGL coverage "to a degree that approaches the breadth of ['occurrence'-based] coverage" before New Jersey's 1971 approval of the exclusion. (App. 85a.) By abrogating the literal language of the pollution-exclusion clause, the supreme court put the "insurance industry" at risk for billions of dollars in non-contractual liability.

The supreme court based its equitable-estoppel holding on a New Jersey case never cited or argued by Morton or its supporting *amici—Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969). (*See* App. 88a-90a.)[9] Without any briefing on the question, the supreme court extended *Harr*, which involved a single insurer dealing with an unsophisticated customer, to the very different situation of IRB/MIRB submissions to expert regulators. (App. 90a.) Further, in the absence of any evidentiary record on equitable-estoppel issues, the supreme court drew on case reports, journal articles, and selected fragments of 1970 regulatory history to make summary and *de novo* findings of fact on those issues.

The court ruled (1) that the 1970 IRB/MIRB submissions "to New Jersey and other state regulatory agencies" were "grossly misleading," (2) that those submissions influenced

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[9] In *Harr*, the supreme court established the principle that "where an insurer or its agent misrepresents . . . [insurance coverage to an insured], and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage." 255 A.2d at 219. Having announced that principle, the *Harr* court remanded that case (where $7,500 was at stake) for fact-finding. The equitable-estoppel elements delineated in *Harr* are the same as those recognized in many decisions of this Court. *See Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. 486, 494 n.5 (1991) (estoppel elements consist of misrepresentation, reasonable reliance, and detriment); *Lyng v. Payne*, 476 U.S. 926, 935 (1986) (same); *Heckler v. Community Health Servs., Inc.*, 467 U.S. 51, 59 (1984) (same).

New Jersey's "review of the . . . clause," and (3) that "a significant rate reduction" would have been "inescapable" had 1970 regulators understood the clause. (App. 35a, 87a, 90a.) Then, even though IRB and MIRB had submitted the pollution-exclusion clause only on behalf of their 1970 memberships, the court purported to equitably estop the "insurance industry" from enforcing that clause (including companies which only later adopted the IRB/MIRB clause in reliance on the 1970-71 regulatory approvals). (App. 90a.)

The supreme court stated that it would have allowed enforcement of "the pollution-exclusion clause as written" absent grounds for an equitable estoppel. (App. 95a.) Nonetheless, the court expressly refused to remand for consideration of factual issues relevant to an estoppel theory, asserting that a remand would be "redundant" in view of the availability of non-evidentiary materials on which it could rely to make *de novo* findings of fact.[10]

Having announced a broad equitable estoppel against enforcement of the pollution-exclusion clause, the supreme court concluded that Morton itself could not benefit from the estoppel in this case. Morton's predecessors " '[knew] that the mercury and its effluent was harmful to the land over which it coursed and the waters into which it fell' " and thus, as to Berry's Creek, Morton fits within the class of intentional dischargers of known pollutants against whom the pollution-exclusion clause may still be enforced. (App. 113a; *see* App. 103a-05a.) Hence, in a Pyrrhic victory for the insurers whose policies *sub judice* included the pollution-exclusion clause, the court upheld summary judgment against Morton on the basis of the clause. (App.

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[10] The court stated: "[T]he insurers urge that we not consider the regulatory history . . . without a fuller record, [but] we are persuaded that a remand would be redundant, and that this record together with the reported cases that address the regulatory history and the abundant independent commentary on the subject affords an accurate and comprehensive basis for our determination." (App. 35a.) Despite the court's use of the phrase "fuller record," there was in fact *no* evidentiary record on equitable-estoppel issues. *See* pp. 20-21 *infra*.

103a-05a.)[11] However, the court's broad estoppel ruling has already been followed by other courts, state and federal, applying New Jersey law.[12]

D. The Denial Of Petitioners' Motion For Reconsideration.

Petitioners timely sought reconsideration, arguing that the supreme court had denied them "their Fourteenth Amendment rights to due process" by imposing the equitable estoppel without allowing them "the opportunity to present a fully developed factual record and to rebut the evidence upon which the Court relied." (App. 221a; *see* App. 219a-24a.)[13] In support of their request for an

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[11] As to the other policies sued upon by Morton, the court upheld the determinations of the trial court and appellate division that there had been no "occurrence." (App. 105a-13a.)

[12] *See, e.g., Nestle Foods Corp. v. Aetna Casualty & Surety Co.*, 842 F. Supp. 125 (D.N.J. 1993); *Continental Ins. Co. v. Beecham, Inc.*, 836 F. Supp. 1027 (D.N.J. 1993); *UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co.*, No. ESX-L-016044-90 (N.J. Super. Ct. Law Div. Mar. 16, 1994) (App. 249a-50a); *AT&T Co. v. Aetna Casualty & Surety Co.*, No. W-56581-88 (N.J. Super. Ct. Law Div. Nov. 19, 1993) (App. 257a-58a). Review is fully available to petitioners even though the supreme court affirmed summary judgment against Morton with respect to its claims concerning Berry's Creek. Morton now has obtained a ruling adverse to petitioners under the pollution-exclusion clause, and the general estoppel announced under New Jersey law by New Jersey's highest court has been and will be invoked against petitioners by others whose policies contain the clause as well. Petitioners are entitled to seek relief from these adverse aspects of the judgment below. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334-35 (1980); *Electrical Fittings Corp. v. Thomas & Betts* Co., 307 U.S. 241 (1939).

[13] As noted above, invoking considerations of fundamental fairness, petitioners requested a remand on any regulatory history issues even in advance of the supreme court's decision. However, the motion-for-reconsideration request alone would have sufficed to preserve petitioners' due process claim. *See, e.g., Saunders*, 244 U.S. at 320 ("[t]he defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance"); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980).

evidentiary hearing, petitioners sought to show that there was no foundation for the supreme court's *de novo* factual determinations regarding misrepresentation, reliance, and detriment. In particular, with *amicus* support, petitioners presented 44 affidavits of 1970-era insurance regulators, including that of Jerome Steen, who in 1970 was the New Jersey Department of Insurance analyst responsible for review of the proposed clause.[14]

Like numerous other 1970-era regulators, Mr. Steen swore under oath (1) that the 1970 IRB/MIRB presentations were not misleading, (2) that his Department carefully considered the proposed clause and understood its significance, and (3) that no rate reduction had been in order. These affidavits, further discussed at pp. 24-29 *infra*, demonstrated vividly that sharply contested issues of fact exist as to each of the factual prerequisites of an equitable estoppel. Nonetheless, the supreme court denied reconsideration without comment on January 11, 1994. (App. 198a-201a.)

REASONS FOR GRANTING THE WRIT

It is beyond dispute that the Due Process Clause protects the insurer interests implicated here, and the core due process protections also are well-established.[15] The special and important question raised by this case is whether

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[14] Mr. Steen's affidavit is reprinted in full in the Appendix, along with the affidavits of four other 1970-era regulators from Massachusetts, Montana, New York, and South Carolina. (App. 232a-48a.) In addition, 15 other affidavits on reconsideration are reproduced in Edward Zampino, et al., *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847, 881-920 (1993). The supreme court expanded the record to include these affidavits. (App. 202a.)

[15] Due process requires that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Contract rights such as those vitiated below have long been recognized as property interests meriting full due process protection. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

state supreme courts can dispense altogether with due process protections in favor of *de novo* appellate fact-finding based on judicial notice of various case reports, journal articles, and other non-evidential materials. As shown by the decision below, this question is of critical significance in modern, complex civil litigation, an area to which this Court has seldom spoken. *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 Texas L. Rev. 579 (1984) (unlike the areas of criminal procedure and administrative procedure, "civil procedure . . . has remained relatively untouched [by the Supreme Court]").

The need for this Court's review is especially urgent because the decision below conflicts squarely with two decisions of this Court. First, on remarkably similar facts, the Court held in *Ohio Bell*, 301 U.S. at 296-300, that a state administrative agency may not interject factual issues into a proceeding at the last moment and then summarily resolve them by reference to case reports, journal articles, and fragmentary records of other proceedings. This Court has not had occasion to apply the principles of *Ohio Bell* to state appellate courts, and should do so here. *See Garner v. Louisiana*, 368 U.S. 157, 173 (1961) (dictum assuming *Ohio Bell* is applicable to state trial courts).

The decision below also conflicts with *Saunders*, 244 U.S. at 319, where the Court held that, if litigants have not had "the proper opportunity to present [rebuttal] evidence," a state supreme court must remand after announcing the governing legal principles. This case shows the need to affirm the continuing vitality of *Saunders* in the Information Age, when new tools such as electronic databases will tempt appellate courts to substitute trial by judicial notice for the constitutionally guaranteed rights of notice and "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

In addition to raising special and important constitutional issues, this case has considerable practical significance. Beyond the billions of dollars at stake in New Jersey, the decision below has been widely noted in legal

and insurance publications. Other jurisdictions facing enormous pollution clean-up costs will be tempted to follow New Jersey's lead even though, as shown in Part II below, there is no factual foundation whatever for imposition of an equitable estoppel. Indeed, in dissenting from a denial of rehearing, three of the seven justices of the Supreme Court of Florida already have expressly concluded that Florida courts should "apply the estoppel rule of the New Jersey Supreme Court."[16] In addition, to date policyholder counsel have urged at least six other state supreme courts to follow the decision below.[17] Thus, there is a grave danger that this New Jersey decision, itself reached in disregard of the Due Process Clause, will serve as the basis for future rulings in other jurisdictions denying petitioners a meaningful opportunity to be heard. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1335-36 (1994) (Scalia, J., dissenting from denial of certiorari) (noting unfairness of state court reliance on prior case which itself lacked an evidentiary foundation).

More broadly, many major industries are now subject to complex state and federal regulatory programs, which often require regulatory approval for contractual arrangements. If a state court may equitably estop an industry from relying on contractual provisions approved by the

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[16] *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1994 WL 103058, at *3-4 (Fla. Mar. 31, 1994) (Overton, J., dissenting with Barkett, C.J., & Harding, J., from order denying rehearing). By contrast, a fourth justice noted that failure to give the pollution-exclusion clause its "plain and ordinary meaning" could not be justified by either "the drafting history of the . . . clause" or "the social premise that [judges] would rather have insurance companies [than policyholders] cover these losses." *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78293, 1993 WL 241520, at *6 (Fla. July 1, 1993) (Grimes, J., concurring).

[17] *See* briefs filed in *Republic Ins. Co. v. Sunshine Mining Co.*, No. 20699 (Idaho); *Board of Regents v. Royal Ins. Co.*, No. C1-93-24 (Minn.); *City of Portsmouth v. New Hampshire Ins. Guar. Assoc.*, No. 93-703 (N.H.); *Kerr-McGee Corp. v. Admiral Ins. Co.*, No. 81294 (Okla.); *Greenville County v. Insurance Reserve Fund*, No. 93-736 (S.C.); *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, No. 59594-I (Wash.).

state's own regulators, due process mandates that the affected members of the industry must at least be given a meaningful opportunity to present evidence on disputed factual issues. If, instead, the Due Process Clause permits what the supreme court did below, then every regulated industry in the country is at risk of similar summary and retroactive deprivations. The consequences would be catastrophic for the interests protected by the Due Process Clause, and for the stability of contractually-based expectations essential to our complex economy.

I. THE DECISION BELOW CONFLICTS SQUARELY WITH *OHIO BELL TELEPHONE*, WHICH EXPRESSLY FORBIDS A TRIBUNAL TO INTERJECT FACTUAL ISSUES INTO A CASE AT THE LAST MOMENT AND THEN TO MAKE SUMMARY FACTUAL DETERMINATIONS BY REFERENCE TO CASE REPORTS, JOURNAL ARTICLES, AND FRAGMENTARY RECORDS OF OTHER PROCEEDINGS.

The New Jersey supreme court expressly refused petitioners an opportunity to create an evidentiary record on equitable-estoppel issues, preferring instead to engage in *de novo* fact-finding based on its own review of case reports, journal articles, and selected documents from regulatory archives. (App. 35a.) This case presents an important opportunity for this Court to hold that, where there are sharply contested issues of fact on dispositive issues, the Due Process Clause precludes state appellate courts from making summary and *de novo* factual determinations on the basis of such non-evidential materials. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

A. *Ohio Bell Telephone* Forbids State Administrative Agencies To Make Summary Factual Findings By Reference To Case Reports, Journal Articles, And Other Non-Evidential Material.

In *Ohio Bell*, after belatedly defining the issues, the public utilities commission resolved factual questions by

reference to certain "findings of a federal court in Illinois [concerning an affiliate]," "a recognized magazine," and selected "testimony and exhibits" from the Illinois litigation. 301 U.S. at 296-97, 300. This Court emphatically denounced the *Ohio Bell* proceedings as "condemnation without trial," upon the basis of "proofs drawn from the clouds." *Id.* at 300, 307. Rejecting this kind of trial by "judicial notice," Justice Cardozo wrote for the Court:

> [Judicial] notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. . . . "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." . . . [T]o press the doctrine of judicial notice to the extent attempted in this case *and to do that retroactively after the case had been submitted*, would be to turn the doctrine into a pretext for dispensing with a trial.

Id. at 301-02 (emphasis added; citations omitted).

Rather, Justice Cardozo continued, the Due Process Clause required observance of " 'the rudiments of fair play.' " *Id.* at 304 (citation omitted). These mandate a "fair and open hearing" *after* the issues in a proceeding are defined, with fairly "disputable" questions of fact to be resolved "upon the strength of evidential facts . . . spread upon the record." *Id.* at 300, 302, 304. The Court added: "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." *Id.* at 305; *see Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) (citing *Ohio Bell* for the proposition that "the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation").[18]

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[18] *Ohio Bell* reflected principles which this Court has also recognized in many other contexts. While the extent of process owed of course

B. The Due Process Clause Must Equally Forbid State Supreme Courts To Make Summary And *De Novo* Factual Determinations On Critical Issues By Reference To Case Reports, Journal Articles, And Other Non-Evidential Materials.

Here, much as in *Ohio Bell*, it was only after the New Jersey supreme court's final decision invoking equitable-estoppel principles *sua sponte* that petitioners were apprised of the controlling *factual* issues. Yet the supreme court rejected petitioners' repeated requests for a "fair and open hearing" should the regulatory history be deemed relevant. 301 U.S. at 304. Instead, as detailed below, the court indulged in precisely the kind of summary trial by judicial notice condemned in *Ohio Bell*.

In *Garner*, this Court assumed in dictum that *Ohio Bell* applies to state trial courts as well as to administrative agencies. *See* 368 U.S. at 173. The conclusion that *Ohio Bell* must apply to courts is especially compelling here because the critical factual questions include (1) whether misrepresentations were made to state administrative agencies in 1970, (2) whether state regulators were misled by reliance thereon, and (3) whether state regulators otherwise would have required an exclusion-triggered rate de-

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varies depending upon the circumstances, at its core, the Due Process Clause requires (1) notice of the issues, *see Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 84-85 (1988); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); (2) the right to an appropriate hearing, *see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes*, 407 U.S. at 82; *Bell v. Burson*, 402 U.S. 535, 541-42 (1971); *Boddie*, 401 U.S. at 378-79; *Brinkerhoff-Faris*, 281 U.S. at 678, 680-82; (3) the opportunity to present evidence on disputed material facts and, in appropriate circumstances, to challenge adverse evidence and witnesses through confrontation and cross-examination, *see Little v. Streater*, 452 U.S. 1, 13-16 (1981); *Greene v. McElroy*, 360 U.S. 474, 497-502 (1959); *Saunders*, 244 U.S. at 319; and (4) consideration by an unbiased tribunal, *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). These core protections must be extended no matter how late the issue arises in the proceedings below, *see Saunders*, 244 U.S. at 319-20; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930), and even though the granting of an evidentiary hearing may cause additional delays, inefficiencies, and expense, *see Bell*, 402 U.S. at 540-41.

crease. If the 1993 New Jersey Department of Insurance had *sua sponte* consulted the case reports, journal articles, and 1970 regulatory records relied upon by the court below and purported summarily to revoke the 1971 regulatory approval on an equitable-estoppel theory, violation of *Ohio Bell* would be obvious to all. Surely there is no more room under the Due Process Clause for a state supreme court to predicate a final decision upon such "proofs drawn from the clouds." 301 U.S. at 307.

Case Reports. In refusing to remand for creation of an evidentiary record on equitable-estoppel issues, the supreme court identified "reported cases that address the regulatory history" as one of several resources that supposedly could substitute for such an evidentiary record. (App. 35a.) The supreme court then focused on six cases from other jurisdictions addressing the regulatory history in non-estoppel contexts. (*See* App. 78a-83a.)[19] While courts properly consult case reports for other purposes, under *Ohio Bell* a court cannot substitute perusal of case reports for a

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[19] *See Kipin Indus., Inc. v. American Universal Ins. Co.*, 535 N.E.2d 334 (Ohio Ct. App. 1987) (considering regulatory history in connection with arguments that the pollution-exclusion clause is ambiguous), *disapproved by, Hybud Eqpt. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096 (Ohio 1992); *Claussen v. Aetna Casualty & Surety Co.*, 380 S.E.2d 686 (Ga. 1989) (same); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071 (Ill. App. Ct. 1989) (same); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990) (same); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) (same), *cert. denied*, 113 S. Ct. 1846 (1993); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992). *Joy*, which focused solely on the unique regulatory proceedings in West Virginia, relied on a doctrine of West Virginia law providing that "where a definite meaning has been ascribed to language used in an insurance policy, that meaning should be given to the language by the courts." *Id.* at 499. *Joy* neither discussed nor purported to apply the traditional common law doctrine of equitable estoppel, and the West Virginia court did not purport to reach conclusions about the elements of an equitable estoppel. Notwithstanding these decisions, numerous state and federal courts have enforced the pollution-exclusion clause consistent with what the supreme court agreed to be its "plain meaning." (App. 86a; *see* App. 55a-65a.)

litigant's right, with knowledge of the issues, to create an evidentiary record adequate in the circumstances of his or her case. *See* 301 U.S. at 297, 305-06.

It should not be necessary to belabor this point. However, several considerations highlight the offensiveness under the Due Process Clause of the supreme court's *de novo* fact-finding by reference to case reports in lieu of a remand for creation of an evidential record. First, *none* of those cases was decided under equitable-estoppel principles, nor did any involve the *New Jersey* regulatory process. Thus, the case reports did not address in any way the specific factual elements requisite to imposition of an estoppel under New Jersey law. Second, *none* of those cases involved an evidentiary hearing on the regulatory history, and thus none had any firmer grounding in an evidential record than does the decision below.

Moreover, there was no suggestion that these case reports were entitled to any res judicata effect. Even if some of the decisions elsewhere had involved equitable-estoppel issues, *these petitioners* would still be entitled to present *their* defenses under New Jersey law:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971); *see also Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940); *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918). The due process limitations upon res judicata doctrine underscore the pressing need to prevent resolution of factual disputes by free-form judicial notice of case reports discussing, in the absence of an evidentiary record, the general subject of the regulatory history of the pollution-exclusion clause.

Journal Commentary. In refusing to remand, the supreme court also referenced the supposed availability of "abundant independent commentary" concerning the regulatory history and proceeded to cite 11 journal articles on the general topic (none purporting to conduct an equitable-estoppel analysis). (App. 35a; *see* App. 36a-52a.) Journal articles assuredly may be consulted for background but, under *Ohio Bell*, they cannot become the basis for summary resolution of disputed facts which are dispositive under the New Jersey supreme court's equitable-estoppel analysis. *See* 301 U.S. at 300-01. This is especially true because, despite the court's conclusory characterization of the commentary as "independent," the five articles on which the court relied most heavily were authored by policyholder counsel, *i.e.*, partisans in the very dispute the court was called upon to resolve.[20] The supreme court's action in relying so heavily on partisan journal articles is especially repugnant under the Due Process Clause. *See Kingsland v. Dorsey*, 338 U.S. 318 (1949) (upholding the Patent Office's disbarment of an attorney for citing as disinterested evidence an article procured by his client).[21]

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[20] *See* Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 Cornell L. Rev. 610 (1990) (cited six times); Robert D. Chesler, et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9 (1986) (three citations); George Pendygraft, et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 Ind. L. Rev. 117 (1988) (two citations); Thomas Reiter, et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. Cin. L. Rev. 1165 (1991) (seven citations); Robert N. Sayler, *The Emperor's Newest Clothes: Revisionism and Retreat—The Insurers' Last Word on Pollution Exclusion*, 5 Mealey's Lit. Rept. (Ins.) 27 (Oct. 8, 1991) (one citation and other apparent use). *Amicus* briefs were submitted to the New Jersey supreme court by the authors of three of these articles (or others from their law firms).

[21] To illustrate the need for a "fair and open hearing," rather than trial by partisan journal article (*Ohio Bell*, 301 U.S. at 304), it is noteworthy that the court below cited and relied upon certain factual allegations appearing in Robert N. Sayler, note 20 *supra*, in connection with misrepresentation and reliance issues. (*See* App. 51a-52a.) The

The "Record." The supreme court also referenced the "record" before it as a basis for summary and *de novo* fact-finding. (App. 35a.) But *no* factual "record" had been created in the lower courts on the equitable-estoppel issues; the supreme court apparently was referring to fragments of the 1970-71 Department of Insurance record put into the appellate docket by *amici* supporting Morton.[22] But the mere availability of such materials to an appellate court no more supports resolution of the factual issues here without an evidentiary hearing than did the availability of the similar fragmentary materials involved in *Ohio Bell*. *See* 301 U.S. at 297, 305-06. As this Court stated in *Interstate Commerce Comm'n v. Louisville & N.R.R.*, 227 U.S. 88 (1913):

> [W]here rights depended upon facts, [a tribunal cannot] . . . disregard all rules of evidence, and capriciously make findings by . . . fiat. Such authority, however beneficently exercised in one case, could be

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court, however, ignored altogether four equally pertinent articles by insurer counsel published in the same source and submitted in support of petitioners, two of which specifically and in detail rebut the allegations in Mr. Sayler's article. *See* Victor C. Harwood, III, et al., *The "Frivolity" of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Lit. Rept. (Ins.) 19 (Aug. 27, 1991); Victor C. Harwood, III, et al., *The Emperor's Illusionist: Policyholders Retreat from Pollution Exclusion Extrinsic Evidence* (Part I), 6 Mealey's Lit. Rept. (Ins.) 17 (May 5, 1992) and (Part II), 6 Mealey's Lit. Rept. (Ins.) 21 (May 12, 1992); Brian J. Coyle, et al., *The West Virginia Regulatory Filings and Extrinsic Evidence of the "History" of the Pollution Exclusion*, 6 Mealey's Lit. Rept. (Ins.) 17 (Oct. 20, 1992). The unacknowledged existence of articles disputing Mr. Sayler's allegations highlights the fact that the supreme court summarily resolved disputed factual questions without any evidentiary record. Neither the policyholders' articles nor the insurers' articles are a substitute for the due process right to present and confront evidence.

[22] The trial-court record did not even include copies of IRB/MIRB's 1970 submissions to the New Jersey Department of Insurance. Copies of various New Jersey regulatory documents, including the 1970 MIRB submission, were first presented at the supreme court level by the *amici* supporting Morton. (App. 227a-31a.) Morton, in turn, suggested that the supreme court take "judicial notice" of the 1970 MIRB submission. (App. 211a n.4.)

> injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

Id. at 91. The decision below merits the same condemnation.

C. Without The Guidance Of This Court, Parties Embroiled In The Widely-Litigated Controversies Characteristic Of Modern Civil Litigation Will Increasingly Be Denied Basic Due Process Protections.

This Court has a tradition of "zeal[ ] to protect" due process rights in "all types of cases." *Greene v. McElroy*, 360 U.S. 474, 497 (1959). Beyond its own merits and importance, this case warrants review because it reveals the emergence of significant new threats to due process rights in the context of widely-litigated controversies involving whole industries. The controversy over the pollution-exclusion clause has a broad sweep, involving 49 jurisdictions, hundreds of insurers, thousands of polluted sites, and even larger numbers of polluting entities. These circumstances have led to myriad pollution-exclusion cases pitting large numbers of policyholders against large numbers of insurers in large numbers of jurisdictions. (*See* App. 52a-83a.)

Although the pollution-exclusion clause is at issue in many cases, fundamental principles of due process entitle *these petitioners*, in *this case* of first impression under New Jersey law, to a " 'fair opportunity procedurally, substantively and evidentially' " to show that the facts did not support the equitable estoppel announced by the court below. *Blonder-Tongue*, 402 U.S. at 333. In the simpler and more traditional *Harr* case, where only $7,500 was at stake, the Supreme Court of New Jersey readily recognized as much and remanded for fact-finding on equitable-estoppel elements after announcing the governing legal principles. *See* 255 A.2d at 212, 219-21. Here, however, amid the masses of non-evidential material accumulated from pollution-exclusion cases litigated elsewhere (concerning issues other than equitable estoppel), the supreme court

lost sight of " 'the rudiments of fair play' " and refused a remand where petitioners could marshal their defenses. *Ohio Bell*, 301 U.S. at 304 (citation omitted).[23]

Without this Court's guidance, future litigants are sure to suffer similar violations of due process as courts continue to be presented with non-evidential material within the context of widely-litigated controversies. By their very nature, widely-litigated controversies proliferate case reports and journal articles which are carefully tracked by organized bars and often are instantly available to courts through Information Age tools such as computerized databases. Litigants and courts alike may be tempted to misuse such resources as a substitute for creation of an evidentiary record, as happened below and as the decision below has been urged elsewhere. This threat is particularly pernicious at the appellate-court level, where the tools for adversary testing of such materials are severely restricted.

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[23] The supreme court disregarded due process guarantees not only in summarily resolving the questions of misrepresentation, reasonable reliance, and detriment addressed in Part II below, but also in purporting to estop the "insurance industry" from enforcing the pollution-exclusion clause under New Jersey law. (App. 90a.) Under *Harr*, an equitable estoppel may be imposed when "an insurer or its agent" misrepresents coverage. 255 A.2d at 219. Here, the alleged 1970 misrepresentations were made by two membership service organizations, IRB and MIRB, which made specific submissions limited to the particular pollution-exclusion clause proposed and favored by their member insurers, which did not include petitioners Insurance Company of North America and Continental Casualty Company. In 1970, various other insurers proposed their own and different pollution-exclusion clauses, only later adopting the IRB/MIRB clause. Thus, in refusing a remand, the court below did not allow an opportunity for insurers to demonstrate that they could not be equitably estopped because neither they nor any agent of theirs had made any supposed misrepresentation. *See Omrod v. New Jersey Dep't of Civil Serv.*, 376 A.2d 554, 556-57 (N.J. Super. Ct. App. Div.) (estoppel cannot be imposed against persons not implicated in the improper action), *certif. denied*, 384 A.2d 513 (N.J. 1977), *disapproved on other grounds, O'Malley v. Department of Energy*, 537 A.2d 647, 651 (N.J. 1987); *United States v. Florida E.C. Ry.*, 410 U.S. 224, 244-45 (1973) (recognizing the due process right for differently situated persons to submit proof differentiating themselves from others in judicial proceedings); App. 220a, 224a.

In addition to these threats to the integrity of the traditional litigation "record," all manifest here, courts may be tempted to seek shortcuts past due process requirements in cases of great complexity or local significance. Accordingly, this Court's review is required to assure that litigants embroiled in complex and widespread controversies sufficiently important to beget numerous case reports and journal articles are not by that very fact put at risk of deprivations of property or liberty without observance of fundamental due process protections.

II. THE DECISION BELOW CONFLICTS SQUARELY WITH *SAUNDERS v. SHAW*, WHICH EXPRESSLY FORBIDS STATE SUPREME COURTS TO RESOLVE DISPUTED FACTUAL ISSUES AGAINST LITIGANTS WHO HAVE NOT HAD OCCASION OR OPPORTUNITY TO PRESENT REBUTTAL EVIDENCE.

In denying petitioners an opportunity to create an evidentiary record on the belatedly injected equitable-estoppel issues, the decision below also conflicted squarely with this Court's decision in *Saunders*, 244 U.S. at 319. There, the Supreme Court of Louisiana premised its decision on certain evidence which the trial court had ruled inadmissible when proffered by the plaintiff. Writing for the Court, Justice Holmes held that the Louisiana supreme court violated the Due Process Clause by basing its decision on matter which the defendant had neither the occasion nor the opportunity to rebut. *Id.* at 318-19. Rather, due process required a remand to allow the defendant "the proper opportunity to present [rebuttal] evidence." *Id.* at 319.[24]

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[24] *See also Little*, 452 U.S. at 14, 16-17 (recognizing indigent's right to rebuttal evidence under the Due Process Clause); *Hamling v. United States*, 418 U.S. 87, 110 n.11 (1974) (the Due Process Clause permits litigants "full latitude in rebutting every factual issue"); *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (the "right to present evidence is . . . essential to the fair hearing required by the Due Process Clause"); *Greene*, 360 U.S. at 496 (fundamental fairness requires "an opportunity to show that [adverse evidence] is untrue"); *Brinkerhoff-Faris*, 281 U.S. at 678, 680-82 (state procedures must allow litigants a "real opportunity to protect" their interests); *Carter v. Morehouse Parish School Bd.*, 441

Here, the New Jersey court likewise denied due process in refusing a remand on equitable-estoppel issues. To establish a violation of *Saunders*, it is of course not necessary that petitioners show here that they ultimately will prevail on the equitable-estoppel issues in New Jersey's courts. *See* 244 U.S. at 319. Rather, the Due Process Clause guarantees petitioners an opportunity to be heard if critical factual matters are fairly "disputable" or "arguable." *Ohio Bell*, 301 U.S. at 302; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544-46 (1985). That threshold is more than satisfied here. There was *no* evidentiary record on estoppel issues when the supreme court rendered its decision; moreover, petitioners' motion for reconsideration was supported by 44 affidavits of 1970-era regulators disputing the supreme court's factual determinations concerning the equitable-estoppel elements of misrepresentation, reasonable reliance, and detriment. In order to illustrate the prejudice they suffered when denied a remand, petitioners summarize below the showing they would make on remand to rebut the supreme court's summary inferences that the facts here support imposition of an equitable estoppel.

A. On Remand, Petitioners Would Have Shown That The Equitable-Estoppel Prerequisite Of Misrepresentation Is Not Satisfied Here.

The supreme court identified only one alleged act of IRB/MIRB misrepresentation to New Jersey regulators in 1970, the submission of a one-page explanatory memorandum ("Explanation") having one allegedly misleading paragraph. (App. 42a-46a.)[25] The deception perceived by the

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F.2d 380, 382 (5th Cir.) ("ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process"), *cert. denied*, 404 U.S. 880 (1971).

[25] That paragraph stated:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution

court lies in IRB/MIRB's supposed failure to "fully and unambiguously disclose[ ]" that the proposed pollution-exclusion clause would "sharply and dramatically . . . restrict the coverage" for pollution damage under "occurrence"-based CGL policies. (App. 34a, 94a.) On remand, petitioners would have shown that this single paragraph cannot be condemned as a misrepresentation because the statements made in it were accurate when made.

In condemning the Explanation as misleading, the supreme court focused on the *present* impact of the pollution-exclusion clause after the dramatic post-1970 expansion in environmental liabilities. (App. 94a-95a.) But, *in 1970*, policyholder claims for pollution-damage liability were relatively rare and typically involved normal operational pollution. The resulting property damage was therefore considered by insurers to be "expected [or] intended from the standpoint of the insured," and hence to be outside "occurrence" coverage under the 1966 policy. (*See* note 4 *supra*.) If petitioners' version of the real world in 1970 is correct, the IRB/MIRB memorandum was not at all misleading in stating that the then-proposed exclusion would not change coverage "in most cases." (App. 230a.)

This Court's decision in *Ohio Bell* requires that factual determinations about the pollution-liability conditions prevailing in 1970 be based on *evidence*, rather than the judicial speculation on which the supreme court relied. *See* 301 U.S. at 301 ("a court takes judicial notice of the fact that Confederate money depreciated in value during the [Civil War] . . . , but not of the extent of the depreciation at a given time and place") (citations omitted). The need for *evidence* on this point was underscored by the 44 af-

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> or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.

(App. 230a; *see* App. 42a.) The court discussed other supposed misrepresentations to regulators in Georgia, Kansas, West Virginia, and Puerto Rico in submissions that simply tracked the language of the Explanation. (*See* App. 46a-50a.)

fidavits submitted in support of petitioners' motion for reconsideration. Thus, for example, Jerome Steen, the responsible New Jersey regulator, expressly stated under oath that the Explanation was *not* misleading because "[c]laims for environmental damage were not common at the time." (App. 232a-33a ¶ 5.) The former Montana Insurance Commissioner averred:

> 4. Pollution claims were extremely rare in 1970. In most cases, those few claims were already precluded by the coverage limitation the occurrence definition placed on expected or intended damage. In 1970, it was a matter of common knowledge that damages caused by routine and repetitive business practices were not covered occurrences. That damage should be expected, and was a cost of doing business. It was not an insurable risk.

(App. 239a; *see also* App. 237a ¶ 4; App. 242a ¶ 6; App. 246a-47a ¶¶ 3, 8.) Under *Saunders*, petitioners were entitled to "put [their] evidence in" on this point to rebut accusations of misrepresentation. 244 U.S. at 319.

B. On Remand, Petitioners Would Have Shown That The Equitable-Estoppel Element Of Reasonable Reliance Is Not Satisfied Here.

Under New Jersey law, the second prerequisite to imposition of an equitable estoppel here is that the New Jersey regulators "reasonably relie[d]" upon IRB/MIRB's supposed misrepresentations. *See Harr*, 255 A.2d at 219. On this point, the supreme court stated that "the IRB misled [New Jersey's] insurance regulatory authority" and that regulatory authorities "would not readily have understood" that the exclusion barred coverage in the absence of an abrupt and accidental discharge. (App. 35a, 90a.) The fundamental unfairness of the supreme court's summary fact-finding is particularly self-evident with respect to this estoppel element.

First, since there had been no evidentiary proceedings on equitable-estoppel issues, there was *no* record evidence

(and the supreme court pointed to nothing) purporting to show that New Jersey's 1970 regulators, themselves insurance experts, failed to comprehend the then-proposed exclusion due to reliance on the Explanation.[26] Rather, the supreme court simply deemed the reliance element satisfied on the basis of its own summary inferences. The court's approach not only violated the due process prohibition against decisions lacking evidentiary foundation (*Louisville*, 227 U.S. at 93), but also violated the holding in *Ohio Bell* that tribunals may not summarily resolve matters which "can be known only to the experts." 301 U.S. at 301. Before suffering an estoppel, petitioners were entitled to present their evidence about what expert regulators "would . . . have understood" in 1970. (App. 35a.)

The importance of allowing such rebuttal was underscored when numerous 1970-era regulators swore under oath that they had in fact understood perfectly well that pollution-damage claims would be barred in the absence of abrupt and accidental discharges. After showing in detail that the proposed exclusion was evaluated carefully and at length by numerous personnel in the New Jersey Department of Insurance, the affidavit of Jerome Steen concludes:

> 15. Whatever [per]spective twenty plus years after the fact might bring to consideration of the Department's actions in 1970, the Department invested considerable effort and time in evaluating the subject exclusions. The Department was not ignorant, inept, indifferent to ethical and statutory obligations, or misled in making its determination in this matter.

(App. 236a; *see* App. 237a-38a ¶¶ 2-6; App. 239a-40a ¶¶ 2-3, 5, 7; App. 241a-43a ¶¶ 4-9; App. 246a-48a ¶¶ 3-10.) Again, under *Saunders*, petitioners were entitled to "put [their] evidence in" showing that regulators had not been led astray by reliance on the Explanation. 244 U.S. at 319.

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[26] The very suggestion is inherently implausible because the court agreed with petitioners that the exclusion has a "plain meaning." (App. 86a; *see* App. 34a-35a.)

C. On Remand, Petitioners Would Have Shown That The Equitable-Estoppel Element Of Detriment Is Not Satisfied Here.

The third prerequisite to an equitable estoppel under *Harr* is "ultimate detriment," which the supreme court found satisfied here because of the absence of an exclusion-triggered rate reduction. *Harr*, 255 A.2d at 219; App. 86a-90a. Without any evidentiary foundation whatever, the court reasoned that, had the 1970 regulators understood the import of the proposed exclusion, a "significant rate reduction" (which did not occur) would have been "*inescapable*." (App. 87a (emphasis added).)

Once again, however, the proper rate impact of a proposed exclusion from CGL policies is something which "can be known only to the experts" and hence is *not* something about which a court, in the absence of an evidentiary record, can reach an "inescapable" conclusion. *See Ohio Bell*, 301 U.S. at 301. On remand, petitioners would have shown that, in 1966, no rate increase had been sought due to the conversion of coverage to an "occurrence" basis. (*See* pp. 3-4 *supra*.) Thus, there was no occasion in 1970 for proponents of the pollution-exclusion clause to propose a rate decrease (nor for regulators to impose one) when returning coverage of pollution risks alone to an "accident" basis.

Moreover, once this factual issue was belatedly brought into focus, 1970-era regulators swore under oath that, absent loss experience prior to 1970, there was no basis to rate the pollution exposure or calculate a premium adjustment. The affidavit of Jerome Steen makes precisely that point, concluding that "[i]n such circumstances, it was an accepted procedure to allow existing rates to prevail, . . . [and] rates [subsequently] would flow downward or upward based upon the actual specific effect on the classes or classifications that would be affected." (App. 235a ¶ 13.) Sworn testimony from the 1970 Massachusetts Insurance Commissioner demonstrates just how far afield the supreme court's speculation took it on the detriment issue:

> 7. The lack of a premium reduction when the exclusion was approved did not mean the exclusion's restrictive effect was not understood in my department. Pollution claims were quite rare in 1970. This was many years before the age of Superfund. There was no way to rate the exposure at that time. Premiums would have been adjusted prospectively as loss data was compiled.

(App. 238a; *see* App. 240a ¶ 6; App. 243a-44a ¶ 10; App. 247a ¶ 8.) Here, then, is another glaring indication of the prejudice suffered by petitioners when the supreme court refused a remand which would have allowed petitioners to show that the facts do not support imposition of an equitable estoppel.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of New Jersey.

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Respectfully submitted,

M. ELIZABETH MEDAGLIA
JAMES T. SCHALLER
ROBERT N. KELLY
NICHOLAS P. JELLINS
JACKSON & CAMPBELL
1120 20th Street, N.W.
Suite 300 South
Washington, DC 20036
(202) 457-1600

Attorneys for Petitioner American Home Assurance Company

WILLIAM T. COLEMAN, JR.
Counsel of Record
JOHN L. ALTIERI, JR.
DONALD T. BLISS
PAUL R. KOEPFF
CARL R. SCHENKER, JR.
O'MELVENY & MYERS
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004
(202) 383-5325

Attorneys for Petitioner Insurance Company of North America

JAMES KIRK PERRIN
DANIEL P. CASWELL
TERESA ROONEY WILLIAMS
HASKELL & PERRIN
200 West Adams Street
Suite 2600
Chicago, IL 60606
(312) 781-9393

Attorneys for Petitioner Continental Casualty Company

JOHN G. ROBERTS, JR.
HOGAN & HARTSON, L.L.P.
Columbia Square Building
555 13th Street, N.W.
13th Floor West Tower
Washington, DC 20004
(202) 637-5810

Attorney for Petitioner First State Insurance Company

ELLIOTT ABRUTYN
MORGAN, MELHUISH, MONAGHAN, ARVIDSON, ABRUTYN & LISOWSKI
651 W. Mount Pleasant Avenue
Livingston, NJ 07039
(201) 994-2500

Attorney for Petitioner General Accident Insurance Company of America

JOHN C. SULLIVAN
MANTA AND WELGE
101 Carnegie Center
Suite 215
P.O. Box 5306
Princeton, NJ 08543
(609) 452-8833

Attorney for Petitioner Liberty Mutual Insurance Company